

No. 11,715

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

EDGAR A. SADLER,

Appellant,

VS.

CLARENCE T. SADLER,

Appellee.

APPELLANT'S OPENING BRIEF.

H. R. COOKE,

JOHN D. FURRH, JR.,

First National Bank Building, Reno, Nevada,

Attorneys for Appellant.

FILED

DEC 8 - 1947

PAUL P. O'BRIEN,

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IN THE

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EDGAR A. SADLER,

VS.

CLARENCE T. SADLER,

Appellant,

Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT AS TO JURISDICTION.

Clarence T. Sadler, a citizen of California and resident of Berkeley, said state (hereinafter referred to as "plaintiff"), on September 6, 1944 filed his complaint (R. p. 2) against Edgar A. Sadler, a citizen of Nevada and resident of Eureka County, said state (hereinafter referred to as "defendant"), in the United States District Court for the District of Nevada, alleging (R. p. 2) the amount involved exceeded \$3000.00 exclusive of interest and costs. On February 2, 1945 plaintiff filed amended complaint. (R. p. 48.) The record shows (R. p. 115) defendant made three separate motions for dismissal, all of which were overruled by the trial Court. Defendant

filed his answer November 17, 1945. (R. p. 62.) Trial was had to the Court without a jury and judgment and decree was entered for plaintiff and against defendant on June 19, 1947 (R. p. 99), and within 30 days thereafter, to-wit: July 16, 1947, notice of appeal to this Court was duly given. (R. p. 103.) On July 12, 1947 bond for costs on appeal was furnished by defendant and filed. (R. p. 104.)

The jurisdiction of the District Court of the controversy arose under Section 24 of the Judicial Code (28 U.S.C.A., Sec. 41) as amended, 1946 Cumulative Annual Pocket Parts, page 30.

The Circuit Court of Appeals has jurisdiction of this appeal pursuant to Section 128 (a) of the Judicial Code, 28 U.S.C.A., Section 225, as amended 1946, Cumulative Annual Pocket Parts, page 129; Rules 73 and 75 of Federal Rules of Civil Procedure of the United States. This appeal is of right. (Authorities, *supra*.)

STATEMENT OF THE CASE.

Reinhold Sadler, a former Governor of Nevada (1898-1902) died January 29, 1906, at which time (as alleged (R. p. 48) by plaintiff, but denied (R. p. 62) by defendant) he owned "certain shares of stock in two corporations, and was also the owner of Diamond Valley Ranch in Eureka County, Nevada, together with the livestock, ranch equipment and other personal property on said ranch. He left a will which was admitted to probate on March 24, 1906 and the

surviving wife Louisa Sadler was appointed administratrix and she qualified, but nothing further was done. (R. p. 149.) Louisa Sadler died intestate (R. p. 50) on August 6, 1923. No administration on her estate was had. There were five children (R. p. 49), viz.: Wilhelmina Sadler Plummer, who died September 5, 1903, leaving a son, Edgar L. Plummer; Edgar A. Sadler, defendant; Alfred R. Sadler, who died March 5, 1944, and whose wife Kathryn Powers Sadler was appointed administratrix of his estate; Bertha Sadler, who died intestate and no proceedings for administration of her estate; and Clarence T. Sadler, the plaintiff.

In December, 1915 a quiet title suit was filed in the State District Court of Eureka County, Nevada, bringing in (R. p. 50) with others, Louisa Sadler, Edgar A. Sadler and Clarence T. Sadler. On February 14, 1918 (R. p. 18) a stipulation by all parties was made and filed, consenting that Edgar Sadler and Alfred Sadler be decreed to be the owners of all the Diamond Valley Ranch and that none of the other parties had any right, title or estate in said property or any part thereof. Said stipulation is Ex. C annexed to plaintiff's complaint and made a part thereof. (R. p. 18.) Decree was thereupon entered (R. pp. 23-31) and Edgar Sadler and Alfred Sadler were adjudged true and lawful owners of the lands described in Par. III of said decree. (R. pp. 31-32.) Said decree was entered (R. p. 34) on March 2, 1918 and (with said stipulation) is made part of plaintiff's case before this Court.

On March 2, 1918 (denied by defendant, but as found by the trial Court) the "Agreement", Exhibit L (R. p. 41), was made. This document was termed by plaintiff as the "crux" of his case. The evidence as to defendant ever having signed or seen said document, or even heard of its claimed existence, until the trial, is conflicting.

On March 2, 1918 defendant and Alfred R. Sadler borrowed \$16,500.00 from the Washoe County Bank, using \$15,000.00 thereof to purchase the said Diamond Valley Ranch and \$1650.00 was used to pay off lawyers' fees in the quiet title suit. To obtain the money Edgar and Alfred signed a note and mortgage on said ranch and a chattel mortgage covering 200 head of cattle belonging (as we claim) to Edgar exclusively. Edgar at once took possession and with his family continuously occupied said ranch, his sole occupation thereon being cattle raising, running from several hundred to six or seven hundred head. Neither Alfred nor plaintiff spent any time on the ranch from March 2, 1918 to the time of commencement of this action, except that Alfred had been there three or four times since March 2, 1918, and that plaintiff stopped off there on several occasions when on a duck hunt or making a trip through Nevada to Utah.

According to plaintiff, his first contract with Edgar about plaintiff's having any interest in the ranch was in July, 1938. Both Edgar (R. pp. 224-226) and Ethel (R. p. 461) testified Edgar then told Clarence he (Clarence) had nothing to do with the ranch.

On July 28, 1932 plaintiff wrote Alfred (Ex. N, R. p. 573) complaining of Edgar and charging that he was in effect misappropriating or even embezzling some of the proceeds and moneys now claimed to be belonging to the alleged trust.

This action was not commenced until September 16, 1944, more than 12 years after plaintiff (vide said Ex. N) had both notice and knowledge that the person plaintiff now claims was his trustee had been unlawfully appropriating some of the alleged trust res.

On September 24, 1937, 7 years prior to commencement of the action, plaintiff learned (Ex. 39, R. p. 370) of Edgar selling some 800 head of cattle and receiving \$48,000.00 for same and that Edgar kept the whole thereof.

The defenses of Edgar were (R. p. 62):

1. Denial of the alleged trust.
2. Statute of Limitations (R. pp. 66-67—first affirmative defense); defendant having, to plaintiff's knowledge, repudiated the alleged trust 20 years or more prior to the commencement of action. (Nevada Statute of Limitations, N.C.L., Secs. 8524-8527.)
3. Laches (R. pp. 67-74) based upon plaintiff's failure to seasonably commence action after knowledge that defendant repudiated and denied any trust, lulling and misleading defendant to his irreparable damage if plaintiff be permitted to now have his action.

4. No consideration for the alleged trust. (R. p. 75.)

5. Trust agreement as alleged (R. pp. 75-76) by plaintiff, being in part not in writing and the same relating to real property, was void under Nevada Statute of Frauds, N.C.L., Section 1527.

6. Alleged trust agreement (R. p. 76), if ever made, offended the rule against perpetuities.

ARGUMENT.

EDGAR L. PLUMMER, GRANDSON, UNDER THE WILL OF REINHOLD SADLER, DECEASED, AND UNDER NEVADA LAW AS TO LOUISA SADLER, DECEASED, TOOK AND HAD AN UNDIVIDED 25% INTEREST AT TIME THIS SUIT WAS COMMENCED, BUT WITHOUT HIS BEING BEFORE THE COURT THE TRIAL COURT AWARDED HIM ONLY A 13% INTEREST.

(Points 1, 2, 3, R. pp. 106-107; also Point 12, R. p. 112.)

SPECIFICATION OF ERROR NO. I.

The foregoing is established by the fact that the trial Court found (R. p. 94) that plaintiff was entitled to 29%, Edgar and Alfred Sadler being in precisely same position as Clarence, the trial Court finding then is that Edgar Sadler and the Alfred Sadler Estate were each entitled to 29%; thus disposing of 87% of the whole estate and leaving but 13% to Edgar L. Plummer who was entitled to share equally.

Governor Sadler died January 29, 1906. (R. p. 48.) His will was made September 28, 1881. (R. p. 8.) Wilhelmina (referred to as "Minnie", R. p. 49), was

named one of devisees. She died September 5, 1903. (R. p. 49.) Edgar L. Plummer is the only child of Wilhelmina. Had she survived her father she would have taken at his death on January 29, 1906, an undivided one-fifth or 13.333% of 66.666% of said estate—there being then living one sister and three brothers, viz.: Bertha, Edgar, Alfred and Clarence (Louisa, the widow, being willed the remaining one-third or 33.333%).

Bertha died without issue on April 29, 1921 (R. p. 49) and Louisa Sadler died August 6, 1923, owning said 33.333% of the whole of said estate, in addition to which she took an undivided $\frac{1}{5}$ th or 20% of the 13.333% of the Bertha lapsed devise amounting to 2.666%, making a total of 35.999% belonging to her.

Therefore the total belonging to Edgar L. Plummer, as sole heir of his mother Wilhelmina, is 15.999%, plus an undivided one-fourth of the estate of his grandmother, Louisa, or 8.999%, making a total of 24.998%.

To further elucidate, we submit the following schedule:

To:

Louisa Sadler (widow)	$\frac{1}{3}$ or	33.333%
Edgar Sadler (son)	$\frac{1}{5}$ or	13.333%
Alfred Sadler (son)	$\frac{1}{5}$ or	13.333%
Bertha Sadler (daughter)	$\frac{1}{5}$ or	13.333%
Clarence Sadler (son)	$\frac{1}{5}$ or	13.333%
Edgar L. Plummer (grandson)	$\frac{1}{5}$ or	13.333%
Bertha's devise lapsed—adding $\frac{1}{5}$ of her 13.333% or 2.666% to each of the following survivors, as follows:		
Edgar Sadler, original	13.333% plus said 2.666%, a total of	15.999%
Alfred Sadler	Same	15.999%
Clarence Sadler	Same	15.999%
Edgar L. Plummer	Same	15.999%
Louisa died intestate (R. p. 50) August 6, 1923 owning (presumably) her original 33.333% of the whole estate, plus said 2.666%, her $\frac{1}{5}$ share of the Bertha lapsed devise—making the Louisa total interest		35.999%

Divided among her heirs, the following interest holdings are produced, viz.:

To:

Edgar Sadler, the original	13.333%, plus 2.666% of the Bertha lapsed devise, plus $\frac{1}{4}$ or 8.999% of the Louisa 35.999% interest—a total of	24.998%
Alfred Sadler	Same	24.998%
Clarence Sadler	Same	24.998%
Edgar L. Plummer	Same	24.998%

Practically one-half ($12\frac{1}{2}\%$) of Plummer's 25% was by the operation of the judgment of the lower Court, taken from him and awarded to Edgar, Clarence and the Alfred Sadler estate. On the basis of plaintiff's case (R. p. 53) the property in controversy

is worth "in excess of \$100,000.00"; hence it would appear that \$12,000.00 belonging to Plummer had been given—\$4000.00 each to the three other interests.

"When any estate shall be devised to any child or other relation of the testator, and the devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate so given by the will, in the same manner as the devisee would have done if he would have survived the testator."

N. C. L., Sec. 9922.

That Edgar L. Plummer was an indispensable party to the action seems certain from a mere statement of the facts. We cite a few of the many authorities.

"* * * where a number of persons have undetermined interests in the same property, or in a particular trust fund, and one of them seeks, in an action, to recover the whole, to fix his share, or to recover a portion claimed by him, * * * other persons with similar interests are indispensable parties. The reason is that a judgment in favor of one claimant for part of the property or fund would necessarily determine the amount or interest which remains available to the others. Hence, any judgment in the action would inevitably affect their rights."

Brown v. Christman (C.C.A. D.C.), 126 F. (2d) 625, 632—approving and quoting per *supra* from *Bank of Cal. Nat'l Assn. v. Super. Ct.* (Cal.), 106 P. (2d) 879, 883.

As a test in determining what is an indispensable party it was said:

“After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between parties before it? (3) Will the decree if made, in the absence of such party, have no injurious effect on the interests of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?”

The Court added that if any one of the four questions is answered in the negative, then the absent party is indispensable.

State of Washington v. United States (C.C.A. 9th), 87 F. (2d) 421-428.

See also the following:

Shields v. Barrow, 17 How., 130, 15 L. Ed. 158, 161;

Cons. Water Co. v. City of San Diego (C.C.A. 9th), 93 F. 849, 852;

Franz v. Buder (C.C.A. 8th), 11 F. (2d) 854, 856-857;

Baird v. Peoples Bank & Tr. Co. (C.C.A. 3rd), 120 F. (2d) 1001, 1003.

THE TRIAL COURT ERRED IN ASSUMING JURISDICTION AND DENYING DEFENDANT'S MOTIONS FOR DISMISSAL OF ACTION FOR FAILURE OF COMPLAINT TO STATE A CLAIM AGAINST DEFENDANT UPON WHICH RELIEF COULD BE GRANTED, THERE BEING AN ABSENCE OF LEGAL REPRESENTATIVE OF THE ESTATE OF LOUISA SADLER, SURVIVING WIFE AND AN HEIR OF REINHOLD SADLER, DECEASED, AND ALSO ABSENCE OF EDGAR L. PLUMMER, GRANDSON OF SAID DECEASED,—BOTH INDISPENSABLE PARTIES.

(Points 1, 2, 3, R. pp. 106-107; also Point 12, R. p. 112.)

SPECIFICATION OF ERROR NO. II.

The point supra was thrice urged upon the trial Court and thrice rejected. See:

Notice of motion, insufficiency of facts, filed October 16, 1944 (R. p. 42); decision on, denying January 17, 1945 (R. p. 47).

Notice of motion, absence of indispensable parties, filed December 19, 1945 (R. p. 57); decision on, denying October 17, 1945 (R. p. 61).

Notice of motion for dismissal, filed August 2, 1946 (R. p. 77); order denying (R. p. 80).

It affirmatively appears from the complaint that plaintiff Clarence T. Sadler is only one of five or six heirs of Reinhold Sadler in same proportions as stated in the will of Reinhold Sadler. The will, Exhibit A (R. p. 8) grants entire estate to the heirs, to wit:

- Louisa Sadler, surviving wife
- Edgar A. Sadler, son (defendant herein)
- Alfred R. Sadler, son
- Bertha Sadler, daughter
- Clarence T. Sadler, son (plaintiff herein)
- Edgar L. Plummer, son of Wilhelmina, a deceased daughter of Reinhold Sadler).

Reinhold Sadler's will was probated in the District Court at Carson City and his surviving wife Louisa was appointed and qualified as executrix. (R. p. 49.) Louisa died intestate (Amended Complaint, R. p. 50) on August 6, 1923. Bertha died intestate (Amended Complaint, R. p. 49) April 29, 1921. Each at time of death owned a substantial interest in the Reinhold Sadler Estate together amounting in value to about \$40,000.00 according to the amended complaint. (R. p. 53.)

It is this defendant's contention that the Court may not jurisdictionally proceed on the complaint of Clarence T. Sadler alone; that the interests of the several beneficiaries are joint, and that the legal representatives of Louisa Sadler, deceased, and Bertha Sadler, deceased, are indispensable parties—in support of which we cite:

“Ordinarily all parties whose interests are involved in the issue, and who must necessarily be affected by the decree, are necessary parties to a suit for an accounting.”

65 *C. J.*, 899, Sec. 795 and N. 10.

If absent party's interest is joint with that of either plaintiff or defendant, the absent party is an “indispensable party” and must be joined as either a party defendant or party plaintiff.

Samuel Goldwyn, Inc. v. United Artists (C. C., Del.), 113 F. (2d) 703, 707;

State of Washington v. U. S. (C.C.A. 9th), 87 F. (2d) 421, 427, 428;

Miller v. Mangus (C.C.A. 10th), 125 F. (2d) 507, 511;

Keegan v. Humble Oil & Ref. Co. (C.C.A. 5th),
155 F. (2d) 971 (important case);

Chidester v. City of Newark (C.C.A. 3rd), 162
F. (2d) 598.

The case *infra* is a leading case, and referring to "indispensable parties" as being those left out, where the leaving of them out would leave the controversy in such a condition that its final determination will be wholly inconsistent with equity and good conscience, Mr. Justice Curtis said:

"The bill to rescind a contract affords an example of this kind. For, if only a part of those interested in the contract are before the court, a decree of rescission must either destroy the rights of those who are absent, or leave the contract in full force as respects them; while it is set aside, and the contracting parties restored to their former condition, as to the others. We do not say that no case can arise in which this may be done; but it must be a case in which the rights of those before the court are completely separable from the rights of those absent, otherwise the latter are indispensable parties * * *."

Shields v. Barrow, 17 How. 130, 15 L. ed. 158,
quoted per *supra* in:

Simon v. Shaffer (D.C. Okla.), 11 F. Supp.
450, 452.

The case *infra*, we believe, is closely in point. Action was for accounting and from order dismissing, appeal was taken. One J. F. Joyce had been made a trustee of a large trust property. He, with some five or six brothers and sisters were beneficiaries of

said trust. Two of the sisters, Mattie and Docia, brought the action, making the trustee brother and other brothers and sisters defendants, except *that one sister Mary was not made a party*. One of the beneficiaries had died before the suit was filed, but the complaint (as in the instant case as to Louisa Sadler and Bertha Sadler) contained no allegations in respect to the status of any probate proceedings, whether pending or closed. The Court said:

“It is fair to assume that they have been closed. If so, and Mattie and Docia were entitled to maintain the action as heirs at law of their deceased uncle, all other heirs having like or other non-severable interests were indispensable parties. Their sister Mary had such an interest, was an indispensable party, and was not joined; and so far as appears from the complaint, there may have been other nieces, nephews, or other kinsmen of the deceased, who had nonseverable interests, were indispensable parties and were not joined. That was enough to call for dismissal of the action. * * * Accordingly, if Mattie and Docia were entitled to sue as heirs at law of their father, their sister Mary was an indispensable party, and her absence required dismissal.”

Crutcher v. Joyce (C.C.A. 10th), 134 F. (2d) 809, 817.

In the case *infra*, a case we believe to be also closely in point, plaintiff sought a decree adjudging that defendants and each of them were trustees for plaintiff of an undivided one-third interest in the estate of her father, it was held that notwithstanding plaintiff sought relief only as to herself, the granting

of the relief demanded would necessarily disturb the rights and interests of the owners of the remaining interests and that therefore such persons were indispensable parties. And it further appearing that citizenship of some of said parties was the same as plaintiff, so that if they were added, the jurisdiction of the Court would be defeated,—held the suit should be dismissed.

O'Brien v. Markham (D.C. Cal.), 17 F. Supp. 633, 636.

See also:

Stevens v. Smith (C.C.A. 6th), 126 F. 706.

In the case *infra*, where suit was brought by only two of a larger number of the beneficiaries, who sought to have the interests of themselves and of the other heirs established as against the defendant (which is the fact in the instant case), the Court observed that what plaintiffs sought to have adjudged was the alleged interests not only of the two plaintiffs but also of all the heirs, and consequently held that all of the heirs were indispensable parties and that those omitted could not be brought into the suit without ousting the Court's jurisdiction, and the suit was accordingly dismissed.

Kendrick v. Kendrick (C.C.A. 5th), 16 F. (2d) 744, 745. Cert. denied: 71 L. ed., 877.

Plaintiff's case is for establishment of the alleged trust agreement; for an accounting covering a period of about 26 years' operations, and (Complaint, R. p. 7) for a decree requiring the alleged trustee to convey the corpus of the alleged trust property to plaintiff

and the other parties entitled. The other parties are indispensable. See:

Chicago etc. Co. v. Adams County (C.C.A. 9th), 79 F. (2d) 816, 818-819;

Bland v. Fleeman (D.C. Ark.), 29 F. 669, 671-672;

Cons. Water Co. v. San Diego (C.C.A. 9th), 93 F. 849, 851-852.

One Hedges, a real estate broker in Washington, D. C., had collected rents for various property owners. He died February 9, 1938 owing about \$21,000.00 trust funds. Two claimants out of a larger number sued to establish a lien on a certain fund and to have such fund distributed pro rata to them. On appeal reversing the trial Court, the Circuit Court of Appeals for the District of Columbia said:

“We note, also, the unexplained absence, as parties to this litigation, of other property owners who are entitled, presumably, equally with appellants, to participate in any proper distribution of the disputed fund. If they are indispensable parties, it would be of no sufficient answer that a decree entered in a case in which they were not parties, would not be *res adjudicata* as to them. The facts which would be presented by these additional property owners might vary from the facts entered here. A disposition of the funds, made without giving them opportunity to establish their claims, might be seriously prejudicial to their interests. If they are indispensable parties it is our duty to protect their interests on this appeal, even though the question was not raised in the district court; and it

will be the duty of the district court to protect them in any further proceedings there * * *."

Brown v. Christman (C.C.A. D. C.), 126 F. (2d) 625-631-632.

As a test in determining what is an indispensable party it was said by this Court:

"After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree if made, in the absence of such party, have no injurious effect on the interests of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?"

The Court added that if any one of the four questions is answered in the negative, then the absent party is indispensable.

As applied here, the first question would be answered in the negative, i.e., the interests of the absent parties are not distinct and severable, but are joint with the party before the Court. Also as to the second question, the Court cannot render justice between the parties before it because it is not "justice" to split up the cause of action and compel the defendant to submit to as many different trials as there are claimants, when the matter is essentially but one cause of action. So with the third. The Court cannot render a decree here without having injurious

effect on the interest of the absent party because the decree might have the effect of reducing his interest, and terminating the trust. Obviously, the trust is one single entity and if it is determinative as to one, it is terminable as to all. For aught that appears, the other beneficiaries may prefer to have the trust continue.

State of Washington v. U. S. (C.C.A. 9th), 87 F. (2d) 421, 427.

The case *infra* involved a testamentary trust. The plaintiffs alleged that the defendant trustees made unauthorized, unlawful and improper investment of the trust funds resulting in large losses and seek an accounting and judgment thereon. The defendants, the trustees, moved to dismiss the complaint, among other reasons, upon the ground of non-joinder of indispensable parties. Certain persons in being who would take remainders under the will were listed, and these persons had not been served, and the Court held that the suit must be dismissed for want of indispensable parties to the suit. The Court held that the interests of the parties were not distinct and severable; that the interests of all the parties resided in the corpus of the estate; the interests of the absent defendants could not be ascertained at this time, and they are therefore definitely not severable.

Baird et al. v. Peoples Bank (D.C. N.J.), 31 F. Supp. 622, 624.

“Speaking of the power of a court to adjudicate the controversy between the parties before the court in the absence of indispensable parties, the court in *Varney v. City of Baltimore*, 73 U. S.

280, 285; 6 Wall., 280, 285; 18 L. ed., 825, said: 'If a decree is made, which is intended to bind them, it is manifestly unjust to do this when they are not parties to the suit, and have no opportunity to be heard. But as the decree cannot bind them, the court cannot for that very reason afford the relief asked, to the other parties.' This was a partition suit, and jurisdiction was denied because some of the tenants in common were not before the court."

Buss v. Prudential Ins. Co. (C.C.A. 8th), 126 F. (2d) 960, 967.

The case *infra* was one to declare a trust and upon it being filed the Court issued an injunctive and custodianship order, and the trial Court rendered its orders over the objection that there were other parties, alleged beneficiaries of the trust, and that they were indispensable, etc. On appeal, there was a reversal on the ground the trial Court had no jurisdiction in the absence of the indispensable parties to interfere by injunctive order, etc., with the whole of the property, because such decrees were bound to affect the interests of the absent parties. That the plaintiff's suit being one requiring the alleged trustee to turn over to plaintiffs part of the property in which they were interested, the Court should not have proceeded on the merits to grant full relief as to the property in which the absent parties were also interested.

Edenborn v. Witton (C.C.A. 5th), 74 F. (2d) 374, 376.

We regard the case *infra* as being closely in point. In 1925 Mrs. Simon contracted with defendant as

attorney to recover certain land for her and to secure payment of his fees she executed a deed to an interest in the land. Pending the litigation Mrs. Simon died, leaving as her heirs the plaintiff and two others. Plaintiff Robert Simon alone brought suit alleging that he was one of the heirs; that defendant in the execution of the trust under his employment by the deceased Mrs. Simon, had received moneys for which no accounting had been made to the deceased or to her heirs and plaintiff sought cancellation of the contract and the deed and the recovery of his proportionate part of the moneys to be due on the accounting. The defendant moved for a dismissal of the bill for lack of indispensable parties and this was sustained by the Court. The motion for dismissal also included the ground that the plaintiff had no legal capacity to sue, i.e., the administrator should have brought the suit and this was likewise sustained.

Simon v. Shaffer (D.C. Okla.), 11 F. Supp., 450, 452.

In the case *supra*, the sought for decree of rescission which is entirely comparable to the sought for decree in the instant case of termination of the trust, an accounting, etc., and what was there said about leaving the contract of trust, etc. in full force as respects the absent parties while it was set aside as to the party before the Court, is equally applicable to the instant case.

“Notwithstanding the reason for the trust has ceased and its purpose has been fulfilled, equity will not decree its termination where some of the

trust beneficiaries do not or cannot consent to its termination. So long as it remains uncertain who are the parties in interest, the trust cannot be terminated * * *”

65 C. J., 356, Sec. 131 & N. 91-93.

The non-joinder of an indispensable party is fatal error, and the Court cannot proceed to a decree in the absence of such indispensable party, notwithstanding the fact that the joinder would oust the Court of jurisdiction.

State of Washington v. U. S. (C.C.A. 9th), 87 F. (2d) 421, 428.

In the case *infra* stockholders in a corporation formed a pool for their mutual protection in accordance with which they deposited their stock with trustees, and in a suit to have the pool terminated and void, the Court held that the parties depositing the stock in said pool were necessary parties and that the suit could not proceed without the presence of the persons in the pool as such.

Ryan v. Seaboard etc. Co. (C.C. Va.), 89 F. 397.

“The test of indispensability is not whether the decree is bound to injuriously affect the rights of the absent party; it is enough that such absence may ‘leave the controversy in such a situation that the final determination may be inconsistent with equity and good conscience.’”

Davis v. Henry (C.C.A. 6th) 266 F., 261, 266.

To the same effect, see:

Rogers v. Penobscott Co. (C.C.A. 8th), 154 F. 606, 616;

Commercial etc. Ins. Co. v. Lawhead (C.C.A. 4th), 62 F. (2d) 928, 932.

In the case *infra* it was held that a corporation was an "indispensable party" to a shareholders' suit against directors for losses caused by their misconduct, since decree could not protect directors against further suits by corporation unless corporation was party to the suit.

Philipbar v. Derby (C.C.A. 2nd), 85 F. (2d) 27, 30.

But precisely, on principle, that is the case here, where one of the beneficiaries commences action, but admittedly any decree rendered herein could not protect the defendant Edgar Sadler against such further suit by the other beneficiaries, except by their being made parties to the suit now.

In the case *infra* the Court cited with approval:

"In general, in such a case (suits affecting residuary legatees or distributees) all the other residuary legatees or distributees ought to be made parties, so that the rights and claims may all be conveniently established at the same time, and in the same suit, * * * In suits affecting the rights of residuary legatees or of next of kin, the general rule is that all the members of the class must be made parties."

Stevens v. Smith (C.C.A. 6th), 126 F. 706, 711.

“In suits affecting the rights of residuary legatees or next of kin, the general rule is that all the members of the class must be made parties.”

* *McArthur v. Scott*, 113 U. S. 340, 28 L. ed. 1015, 1032.

The case *infra* was a suit against the defendant to have an accounting as trustee under a power of attorney which is set out in the opinion. The beneficiary died and his widow having died intestate, under the law of descent and distribution in the State of Mississippi, was entitled to take his entire estate after payment of his debts. As such distributee she brought the suit, but on objection being made there was no administration on the estate of the deceased husband and no allegation that the deceased husband left no heirs at law, the bill of the widow for the accounting was dismissed, the Court ruling that the suit could not be maintained for want of proper parties.

Newman v. Schwerin (C.C.A. 6th), 61 F. 865
(Per Lurton, J.).

To the effect that the interests of the absent heirs of Reinhold Sadler are non-severable and that they are “indispensable” parties, see the following, where life tenants sued, and complained of trustee’s administration of the corpus of the trust, and it was held that remaindermen were “indispensable” parties since their interest in the corpus and in the instru-

ment was just as direct as that of the life tenants and there was a distinct and non-severable interest.

Baird v. Peoples Bank (C.C.A. 3rd), 120 F. (2d) 1001, 1003.

Fact that joinder of indispensable parties will oust jurisdiction, does not authorize the Court to proceed in their absence. The plaintiff is not deprived of a remedy but is merely relegated to the state Court.

Talbutt v. Security Tr. Co. (D.C. Ky.), 22 F. Supp., 241-242.

Fact that absent parties would not be bound or concluded by the decree does not affect conclusions that they be brought in when they are "indispensable" parties.

Talbutt v. Security Tr. Co., *supra*.

To allow one of several parties equally interested in a cause of action, to bring a separate action, leaving the other party or parties to subsequently bring one or more additional actions is nothing more nor less than a splitting of the cause of action. The object of the rule against splitting is to prevent repeated litigation; to protect defendant from unnecessary vexation and to avoid the costs and expense incident to numerous suits.

1 *C. J.*, 1107, Sec. 277.

Obviously, if plaintiff were the only heir of Reinhold Sadler and claimant as beneficiary, he could not divide up his interest or bring separate suits, and we are unable to perceive why, in case there are two

or more plaintiffs, a different rule should apply and a defendant be compelled to submit to a number of suits for essentially the same subject matter.

The rule against the splitting of causes of action is mainly for the protection of the defendant.

1 *C. J. S.*, 1308, Sec. 102 & N. 99 citing: Federal as well as State cases.

A defendant is entitled to protection against the cause of action being split up into as many parts as there happen to be alleged beneficiaries. *Nemo debet bis vexari*.

Halpin v. Savannah River etc. Co. (C.C.A. 4th), 41 F. (2d) 329, 333.

Inasmuch as the rule as to "indispensable parties" appears to be the same in state courts, we herewith present some adjudications on the point.

The case *infra* involved a situation quite similar to the case at bar. Defendant, Title Insurance & Trust Co., made a declaration of trust on March 25, 1931, acknowledging delivery to it of real and personal property to be held for the use of named beneficiaries. On March 7, 1936 one of the named beneficiaries, who was also settlor, commenced suit alleging fraud, etc. and prayed that the trust be cancelled and that the title to the real and personal property be quieted in him. The trustee, Title Ins. & Trust Co. raised the point that the Court was without jurisdiction to revise or in any manner modify the trust because the other beneficiaries were not before the Court. The Court said:

“When the litigation is between them, all beneficiaries of a trust are indispensable parties; without their presence the trial court has no jurisdiction to proceed (citing cases). The latest expression of the rule is by Mr. Chief Justice Gibson in the case of *First National etc. Bank v. Superior Court* * * * ‘The law is settled in this state that where one of several beneficiaries seeks to fix his share in a trust fund and where judgment in his favor would inevitably determine the amount available for others similarly situated, such other beneficiaries are indispensable parties. A judgment rendered in their absence purporting to determine their rights is in excess of the court’s jurisdiction (citing cases).’”

Mabry v. Scott (Cal.), 124 P. (2d) 659, 662-663.

Statutes such as Sec. 389, C.C.P. Cal., providing that the Court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, etc. but when a complete determination cannot be had without the presence of other parties the Court must order them brought in, is declaratory of the equity rule of practice.

Bank of Calif. v. Supr. Ct. (Cal.), 106 P. 879, 882-883.

So, in an action by one creditor against assignees for the benefit of creditors, seeking an accounting and payment of his share of the assets, the other creditors held indispensable.

McPherson v. Parker, 30 Cal. 455, 457, 89 A. D. 129.

“It is certainly the general rule, as appellant contends, that in an action in equity against the trustee for an accounting the beneficiaries of the trust are necessary parties; and, where the absence of any of them is shown by the trustee, the court will order them brought in, and will refuse to proceed until they are before it, or, should it so proceed despite the legal protest of the trustee, the decree will be reversed upon appeal * * * It (the rule) is designed for the protection of the trustee himself, in order that he may not be subject to harassment by further litigation at the instance of the omitted beneficiaries, who would not be bound by the former judgment.”

Alison v. Goldtree (Cal.), 49 P. 571, 572.

“When the trial court finds, or the record indisputably shows, that a complete determination of controversy cannot be had without presence of other parties, such parties become ‘necessary parties’ and ‘indispensable parties’, and the section (statute respecting when trial court shall order other parties to be brought in) is mandatory, and the question then becomes one of jurisdiction in that the court may not proceed without bringing them in.”

Bayle-Lacoste & Co. v. Supr. Ct. (Cal.), 116 P. (2d) 458, 464-465.

On August 16, 1929, Edith W. Crose executed a declaration of trust covering certain real and personal property, and naming the First National Trust & Savings Bank of San Diego a trustee, to collect the income and pay same to one Juliet Guthrie Wilson during her lifetime, and upon her death, to her

surviving issue. The trustee refusing to recognize her, Sally Neil Wilson, one of the claimed beneficiaries, commenced action to establish herself as a beneficiary and for an accounting. The trustee answered. On the trial the trustee objected to introduction of evidence on ground the Court did not have jurisdiction to render judgment therein without the presence of four named persons and who were designated beneficiaries. The trial Court overruled the objection and rendered an interlocutory judgment, decreeing that one of the named beneficiaries was entitled to one-half of the income from the trust and ordered the trustee to account.

The trustee contended that the absent beneficiaries were "indispensable parties"; that without their presence trial Court had no jurisdiction to proceed. The California Supreme Court said:

"It may be assumed that under the law the beneficiaries of a trust are indispensable parties to an action involving conflicting rights between themselves or between them and the trustees. (Citing cases.)"

First Natl. Tr. & Sav. Bk. v. Supr. Ct. (Cal.),
121 P. (2d) 729, 731.

A testator left his property to trustees, naming sons and grandchildren as beneficiaries. One of the beneficiaries brought action to construe the trust. Defendants, trustees, objected that the other beneficiaries were not brought in. The trial Court overruled the objection though it tried to decide case before it without prejudice to the absent parties. The

trustees appealed, contending they were not protected against the persons interested in the trust but who had not been brought in before the Court. In reversing the trial Court, the Appellate Court said:

“The action involves the rights of the beneficiaries, not only as between themselves, but also as between them and the trustees. This being so, the latter are entitled to protection against further litigation, and to have the rights of all interested in this portion of the trust estate finally determined.”

Smith v. Bank of California (Cal.), 65 P. (2d) 1361, 1363.

So, in a case where one of two settlors to a trust, under which there were four beneficiaries named, brought suit against trustee alleging invalidity of trust, and point was made as to absence of the beneficiaries, the trial Court nevertheless proceeded with the case to judgment. The Appellate Court in reversing, said the principle that in such cases the beneficiary must be brought before the Court, had been squarely decided in previous cases and the doctrine confirmed by later cases and added:

“No lack of interpleading, omission or negligence of the trustee will excuse this omission.”

Hutchens v. Security Tr. & Sav. Bk. (Cal.), 281 P. 1026, 1028.

In the case *infra* a debtor executed a deed of trust to secure debts to two persons. The trustees brought suit to have the Court declare the interests of the respective parties under the deed of trust and to

foreclose same. But one of the persons for whose benefit the trust was created was not made a party thereto, and the point was made that a court of equity could not properly dispose of the case until the said party was before it, and that the trustee could not properly represent such absent creditor or beneficiary. A decision of the trial Court to the contrary was reversed on appeal.

Mitau v. Roddan (Cal.), 84 P. 145, 147, 6 L.R.A., N.S., 275.

Where plaintiffs and ten others, owners of property, conveyed same to a trustee to carry out their written contract with defendant, and plaintiff subsequently brought an action against the trustee for cancellation, etc., but did not bring before the Court the other parties interested in the trust. It was held that the trial Court committed error in proceeding without the absent parties; that the trustee was not authorized under the statutory provision which provides that the trustee of an express trust may sue without joining beneficiaries, etc., same being applicable only to the case of strangers, and on appeal the Supreme Court reversed the action above of the trial Court.

Lake v. Dowd (Cal.), 270 P. 212, 213.

One Franz died February 7, 1898, leaving his property to his wife for life, remainder over to his ten children in equal shares. Thereafter the wife by trust agreement conveyed certain stocks, bonds, etc. to two persons as trustees. Thereafter E. D. Franz, a son and a beneficiary, brought action alleging the trustees

had received information as to the trust property and had refused to account and that trustees wrongfully denied plaintiff had any interest. The other beneficiaries of the trust were not brought before the Court. The trial Court dismissed the case for want of indispensable parties. On appeal, the Court referred to the prayed for accounting and that it would be necessary to determine whether or not the plaintiff still owned an interest, and said:

“We fail to see how any possible decree could be framed granting any part of the relief prayed for without a determination of those issues. It follows that Sophie Franz, who is the owner of the life estate, and the living children and heirs of deceased children, who are the alleged owners of nine-tenths of the remainder estate, are indispensable parties, because they have such an interest in the subject matter of this controversy that, without directly affecting their interests, a final decree could not be rendered between the present parties to the suit.”

Franz v. Buder (C.C.A. 8th), 11 F. (2d) 854, 857.

And in discussing the general subject, the United States Supreme Court, in the case *infra*, said:

“And there is a third class, whose interests in the subject matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed.”

Barney v. Baltimore City, 6 Wall. 280, 18 L. Ed. 825.

“Ordinarily where the rights involved in litigation arise upon contract, courts refuse to adjudicate the rights of some of the parties to the contract if the others are not before it (citing cases). Such a judgment or decree would be futile if rendered, since the contract rights asserted by those present in the litigation could neither be defined, aided nor enforced by a decree which did not bind those not present.”

National Licorice Co. v. National Labor Rel. Board, 309 U. S. 350, 84 L. Ed. 799, 810.

“In a suit for an accounting the general equity rule in regard to parties applies, namely, that all persons interested in the subject matter—that is, in the accounting—should be before the court, to the end that complete justice may be administered.”

1 *C. J.*, 631, Sec. 93 and No. 50, citing long list of U. S. Supreme Court and other federal and state Court cases.

“Where several persons have a united or concurrent interest in having an accounting taken, or in its result, one of them cannot maintain a suit for an accounting without joining the others;
* * *”

1 *C. J. S.*, 665, Sec. 37 and N. 62.

“The reason of the rule is that otherwise the accounting party may be harassed with successive suits for the same purpose by each party.”

1 *C. J.*, 631, Note.

“Under Rule 19 (a) persons having a joint interest must be made parties, either as plaintiffs or

defendants. The phrase 'joint interest' must be construed to mean those who were indispensable parties under the previous practice before the adoption of the new Federal Rules of Civil Procedure."

2 *Moore's Federal Practice*, 2142;

Simpkins, Federal Practice, 330 et seq.

THE TRIAL COURT ERRED IN HOLDING IT COULD TAKE POSSESSION OF PROPERTY NOW AND FOR MANY YEARS PAST IN THE POSSESSION OF THE STATE DISTRICT COURT OF NEVADA IN AND FOR ORMSBY COUNTY.

(Point 4, R. p. 107.)

SPECIFICATION OF ERROR NO. III.

The complaint shows that the property involved is the property, or proceeds of property, belonging to Reinhold Sadler at the time of his death. It clearly counts on an equity in the property continuing and inhering in the Estate of Reinhold Sadler, deceased, or the beneficiaries under his will. But there is no allegation that said property was ever distributed to the alleged heirs and legatees named in the will; no allegation that the administration of the Reinhold Sadler estate has ever been closed. The mere fact that the complaint alleges Louisa Sadler, the executrix, has died, is immaterial on this point because the possession of estate property is of and by the Court, and such possession is continued until termination as by law provided. *Therefore, the property is still in custodia legis of the State Court at Carson City.* Plaintiff is in the position of asking this Court to

draw unto itself the property and take same out of the custody of the State Court. No authority we know of authorizes any such procedure. Per contra, the authorities are all against it.

“The courts of the United States * * * cannot seize and control the property which is in the possession of the state court * * * It is also true, * * * that the prior possession of the state probate court cannot be interfered with by the decree of the federal court.”

Waterman v. Canal-Louisiana Bk. & T. Co.,
212 U. S. 33, 54 L. Ed. 80, 84, 85.

See also:

Puder v. Agler (D.C. Ohio), 242 F. 95, 98.

In any event, the legal representative of the Reinhold Sadler estate, the Louisa Sadler estate, and the Bertha Sadler estate would seem to be indispensable parties to this action. Such in fact was the ruling in the case *infra*, which was a suit for an accounting for property alleged to have been withheld from an estate and the Court said the legal representative of the estate was an indispensable party.

Ryan v. Kelsey (C.C.A. 3rd), 259 F. 945,
7 A.L.R. 234.

“An administrator appointed by a state court is an officer of that court; his possession of the decedent’s property is a possession taken in obedience to the orders of that court; it is the possession of the court and it is a possession which cannot be disturbed by any other court.”

Byers v. McAuley, 149 U. S. 608, 37 L. Ed. 867-871.

The identical question was raised and decided by Judge Hawley in the famous litigation involving the Estate of M. D. Foley, deceased. See:

Smith v. Foley (C. C. Nev.), 80 F. 949;

In re Foley (C. C. Nev.), 76 F. 390.

See also, for case on similar facts to case at bar, when Federal Court was held to be without jurisdiction:

Moore v. Fidelity Tr. Co. (C. C. Pa.), 134 F. 489, 493.

We say further that in any event the legal representative of the estate of Reinhold Sadler, deceased, should be brought in as a party. By the device of asking this Court to compel defendant, alleged trustee in possession of the estate property, to account, and to convey said property to the parties entitled, plaintiff is in effect asking that this Court "distribute" the property of such estate. We say further such proceeding is exclusively for the State Probate Court.

TRIAL COURT ERRED IN OVERRULING DEFENDANT'S OBJECTIONS BASED UPON PLAINTIFF'S AMENDED COMPLAINT AFFIRMATIVELY SHOWING THAT HE HAD NO CAUSE OF ACTION IN THAT THE DECREE OF MARCH 2, 1918 ANNEXED TO HIS COMPLAINT DECREED PLAINTIFF HAD NO INTEREST OR EQUITY IN THE DIAMOND VALLEY RANCH AND PLAINTIFF'S ACTION THEREFORE IS MERELY AN ATTEMPT BY INTRINSIC MATTER TO IMPEACH AND NULLIFY SAID DECREE.

(Points 4, 5, 6, R. pp. 107-108.)

SPECIFICATION OF ERROR NO. IV.

Admittedly, said decree, Paragraph III (R. p. 31), adjudged and decreed that defendants Edgar and Alfred Sadler were the true and lawful owners of the land (Diamond Valley Ranch) and that their title is adjudged to be quieted against all claims and demands, as against all persons claiming or to claim said premises or any part thereof, through or under Huntington & Diamond Valley Stock & Land Company, the plaintiff.

Clarence Sadler was a party to said action. Said decree was pursuant to the stipulation, Exhibit C also annexed to the complaint (R. p. 18), in which plaintiff by his attorney-in-fact, Alfred Sadler, stipulated that Edgar Sadler and Alfred Sadler were the owners of the Diamond Valley Ranch; that neither he nor any of the other parties had any right, title or estate in said property or any part thereof; that his counter-claim might be dismissed and that the money to be paid by Edgar Sadler and Alfred Sadler to the plaintiff as the consideration for the settlement and decree, should be solely the obligation of Edgar Sadler and Alfred

Sadler, and that none of the other parties hereto (including himself) shall be in anywise personally liable therefor.

“A judgment is the final determination of the rights of the parties in the action or proceeding.”

N. C. L., Sec. 8794.

A judgment as a plea, is a bar or as evidence, is conclusive not only of the rights which it establishes, but of the facts which it directly decides.

McLeod v. Lee, 17 Nev. 103, 28 P. 124.

“Sec. 6. Any judgment or order in a civil action or proceeding, except when expressly made final by this act, may be reviewed as prescribed by this act, and not otherwise.”

N. C. L., Sec. 8881, as amended, Stats. 1937, p. 55.

There are three methods of reversing, vacating or modifying a judgment, viz.:

By new trial

By appeal

By a suit in equity for extrinsic fraud in the obtainment of the judgment.

No fraud, either extrinsic or intrinsic is pleaded in this case, nor in any way relied upon. Per contra, the stipulation and the decree of March 2, 1918 are pleaded by plaintiff as part of his cause of action as they are annexed to his complaint and made a part thereof.

In respect to action to quiet title, the law is:

“In this form of action all matters affecting the title of the parties to the action may be litigated and determined, and the judgment is final and conclusive, and cuts off all claims or defenses of the losing party going to show title in himself, of whatever source derived, and which existed at the time of the suit, whether pleaded therein or not.”

34 *C. J.*, 959, Sec. 1363 and N. 27, 28.

Plaintiff's action herein, claiming a title or interest in the Diamond Valley Ranch, inhering in him prior to March 2, 1918 and continuing thereafter, is not only ignoring the solemn decree of the Court rendering the judgment on March 2, 1918, pleaded in plaintiff's complaint, but it is flouting and in absolute defiance of that decree.

If (though it is absolutely denied by us) the plaintiff had any title or interest in the Diamond Valley Ranch prior to March 2, 1918, then the decree of March 2, 1918 operated to cut that off as completely and as effectually as if the plaintiff had executed a deed to such interest to Alfred and Edgar Sadler, because the statute provides that a decree of a Court may of itself constitute a transfer of title or interest and be vested in a party found entitled thereto.

N. C. L., Sec. 8797.

It is only as to title acquired after the decree quieting title has been entered that a party may rely upon.

Smith v. Kessler (Ida.), 127 P. 172, 173;

Vore v. Ephraim (Cal.), 159 P. 719, 721.

“Where the title is properly in issue and a judgment is duly made, an adjudication in favor of either party as to such title will necessarily constitute a bar to any action or proceeding as to any title claimed at the time of the commencement of such action by either party or anyone claiming under the same title. Under this principle a claim of one as heir at law to real estate is cut off by a judgment against him in an action to quiet title, in which the title is put in issue and he might have presented such claim but did not;
* * *,”

5 *R. C. L.*, 679, Sec. 54 and N. 6.

“The judgment or decree in an action to quiet title bars subsequent litigation between the parties or their privies on the same cause of action and is conclusive, not only as to all issues actually involved and determined, but also as to such matters as might have been litigated.”

51 *C. J.*, 283, Sec. 280 and N. 54.

Action was to foreclose a trust deed. Two parties were made defendants under the general allegation that they claimed some interest in the property subject to the trust deed. Both these parties answered. The co-defendants made no issue between themselves by serving a cross-complaint or the like, but as issues were actually tried between the parties, the Court held that as the defendants at the trial actually litigated the issues which the decree in the case purports to determine, the decree was conclusive as between them. And that where the issues between the parties had

once been tried and finally determined, the same questions could not again be litigated by said parties or their privies.

Gulling v. Washoe County Bank, 29 Nev. 257, 89 P. 25.

The March 2, 1918 decree operated to absolutely and completely cut off and destroy any interest or claim of interest which the plaintiff Clarence Sadler had, could or might make to the Diamond Valley Ranch at the time such decree was entered. This, as we claim, would naturally include any interest referable to the so-called trust agreement, Exhibit L, assuming it had been signed by Edgar Sadler, if same were made prior to the making of the March 2, 1918 decree. The decree and Exhibit L (alleged trust agreement) are both dated the same day, but plaintiff's amendment to his amended complaint, Paragraph 6, alleges:

"Thereafter (i. e., after the making of the alleged trust document) and on or about March 2, 1918, a judgment and decree duly was entered in said action ordering that the said property be transferred to defendant Edgar A. Sadler and to Alfred R. Sadler, a copy of said decree is attached hereto as Ex. D."

"A judgment rendered by a state court of competent jurisdiction is binding and conclusive upon the parties when made the basis of a claim or defense in any court of the United States, and cannot be reviewed or be examined as to the merits of the original controversy."

34 *C. J.*, 1158, Sec. 1640 and N. 43, citing long list of cases.

If plaintiff had brought this suit in the District Court at Eureka, Nevada and made same contention that he is making in this Court i. e., that despite the March 2, 1918 decree adjudging that he had no title in the Diamond Valley Ranch, he still contended in the District Court at Eureka that he did have an equity as an heir of Reinhold Sadler, deceased, and that this equity continued notwithstanding the March 2, 1918 decree, and he had pleaded the said decree as a part of his complaint, is it not absolutely certain that the judge presiding in the State District Court at Eureka County would hold that plaintiff had pleaded himself out of Court?

The fact that this suit is in the Federal Court and not in the District at Eureka County can make absolutely no difference, because:

“A judgment duly rendered by a state court of competent jurisdiction is entitled to receive in all courts of the United States the ‘full faith and credit’ which the courts of another state would be bound to accord to it; that is, it will be given the same credit, force, and effect which it would receive in the courts of the state where it was rendered, no more and no less.”

34 *C. J.*, 1157, Sec. 1639 and N. 33.

The decree in the quiet title suit entered March 2, 1918, in paragraph III thereof, adjudges that Edgar and Alfred are the true and lawful owners of the Diamond Valley Ranch and

“all persons claiming or to claim said premises or any part thereof; through or under said plaintiff (Huntington and Diamond Valley Stock and

Land Company) are hereby adjudged and decreed to be invalid and groundless, * * *”

Plaintiff's claims are based upon the alleged ownership by Reinhold Sadler, deceased of 4000 shares of stock in a company claimed to be the above, i. e., plaintiff's claims are through or under said company. But as above stated, the decree states that the same “are hereby adjudged and decreed to be invalid and groundless”.

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S OBJECTIONS THAT PLAINTIFF'S CASE IS FATALY DEFICIENT IN THAT THERE ISN'T THE SLIGHTEST EVIDENCE OF ALLEGED ORAL TRUST AGREEMENT MADE PRIOR TO MARCH 2, 1918.

(Point 6, R. p. 108.)

SPECIFICATION OF ERROR NO. V.

Plaintiff's amended complaint alleges, Paragraph 6 (R. p. 51):

“Said stipulation (Ex. C. annexed to Complaint) was made and entered into by Louisa Sadler, Edgar A. Sadler, Alfred R. Sadler, Bertha L. Sadler and Clarence T. Sadler in consideration of an *agreement between them that said Edgar A. Sadler and Alfred R. Sadler would acquire and hold the legal title to said real property, and would take and hold title to and possession of the livestock, ranch equipment and other personal property situated thereon, in trust for the heirs of Reinhold Sadler, deceased as named in the terms and provisions of his said will. Thereafter a written memorandum of said trust agreement*

was executed by said Edgar A. Sadler and Alfred R. Sadler as hereafter alleged. Thereafter and on or about March 2, 1918 a judgment and decree duly was entered in said action ordering that the said property be transferred to defendant Edgar A. Sadler and to Alfred R. Sadler, a copy of said decree is attached hereto as Exhibit D.”

It would thus appear that whatever interest, equity, etc., plaintiff may otherwise have been able to claim under said Exhibit L, it was wholly cut off by the decree made subsequent to said Exhibit L, because that decree is all-sweeping that all claims of persons other than Edgar and Alfred Sadler to said property “are hereby adjudged and decreed to be invalid and groundless”. This is not only the language of the decree but it is also the language of the February 14, 1918 stipulation, Exhibit C, agreed to by plaintiff by his attorney-in-fact.

Further, if as plaintiff alleges, the alleged trust document was made before the decree, then the trust (assuming it to have been signed by Edgar Sadler and all necessary parties) would be ineffective because the rule is that the creator of the trust must hold the legal title to the subject matter at the time the alleged trust is claimed to have been established.

65 C. J., 268—note citing *Farmers etc. Co. v. Winthrop*, 202 N.Y.S. 456, modified, 144 N. E. 686.

THE TRIAL COURT ERRED IN NOT APPLYING THE RULE THAT BURDEN OF PROVING THE ALLEGED TRUST IS UPON PLAINTIFF AND THE PROOF OF ESSENTIALS OF THE ALLEGED TRUST MUST BE CLEAR, SATISFACTORY AND UNEQUIVOCAL.

(Points 5, 6, 7, R. pp. 107-109.)

SPECIFICATION OF ERROR NO. VI.

The alleged trust agreement of March 2, 1918 of itself does not purport to create any trust or power over or concerning lands. It does not purport to give Edgar Sadler and Alfred Sadler, or either of them, the right to occupy the real property. They have no greater power in regard to the real property, so far as the agreement of March 2, 1918 is concerned, than any of the other persons named therein, to-wit: Bertha Sadler, Louisa Sadler or Clarence Sadler. The only trust agreement set up in the plaintiff's amended complaint is an oral agreement or "stipulation" (see p. 4, lines 7 et seq., Amended Complaint) and is described as follows:

"* * * an agreement between them that the said Edgar A. Sadler and Alfred R. Sadler would acquire and hold the legal title to said property, and would take and hold title to and possession of the livestock, ranch equipment and other personal property situated thereon, in trust for the heirs of Reinhold Sadler, deceased, as named in the terms and provisions of his said will. Thereafter written memorandum of said trust agreement was executed by said Edgar A. Sadler and Alfred R. Sadler as hereinafter alleged."

The "hereinafter" written memorandum refers to Exhibit L which of itself does not purport to create

any trust over or concerning lands or any property whatsoever. Evidently it is sought to show a trust by first alleging an oral agreement in reference to it and then stating that some other document entirely different from the alleged oral agreement was "written memorandum of said trust agreement".

"No certain form of words is required in the creation of a trust, but the intention must be complete and plainly manifest, and not derived from loose and equivocal expressions of the parties, made at different times and upon different occasions. Any words which indicate with sufficient certainty a purpose to create a trust will be effective in so doing, without the use of the words 'trust' or 'trustees'." (syl.)

Estate of Smith (Pa.), 27 A.S.R. 641.

"The burden of proving the existence of a trust rests on the person asserting it, and he must prove it by clear and satisfactory evidence having in view all the surrounding facts and circumstances and the intention of the parties."

26 *R.C.L.*, 1203, Sec. 44 and N. 5.

"While it is true that no particular formality is required in the creation of the trust, nor need all the conditions of the trust be expressed in the single paper, nevertheless documents must clearly show, not only the existence of the trust, but also the extent to which the property is held in trust. As said by Mr. Pomeroy in his work on equity jurisprudence, Sec. 1009: 'The declaration of trust, whether written or oral, must be reasonably certain in its material terms; and this requisite of certainty includes the subject matter of prop-

erty embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interest which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general, or equivocal that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail. Citing: *Wittfield v. Forster* (Cal.), 57 P. 219.”

Root v. Kuhn (Cal.), 197 P. 150, 152.

“* * * to constitute an express trust there must be an explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created, accompanied with an intention to create a trust, followed by an actual conveyance or transfer of lawful, definite property or estate or interest. * * *”

65 *C. J.*, 231, Sec. 21 and N. 68-74;

Idem. 265, Sec. 46-47 and N. 16;

Idem. 270, Sec. 50 and N. 43-44.

“Where it is claimed that a trust is to be implied from the transaction the acts must be such as will admit of no other interpretation than the creator retain no legal rights over the property, and the inference arising from the acts must be plain, that either the settlor constituted another trustee or else that he held the property himself as trustee. It would introduce a dangerous instability of titles if anything less was required, or if a voluntary trust *inter vivos* could be established, in the absence of express words, by circumstances capable of another construction, or consistent with a different intention.”

26 *R.C.L.*, 1200, Sec. 36 and N. 18, 19.

“To establish express trust of land, writing must identify property with same certainty required in deed of conveyance, and must clearly show nature and objects of trust.”

Pacheco v. Mello (Wash.), 247 P. 927.

See, also:

65 *C. J.*, 282, Sec. 62 and N. 92-93;

Idem. 271, Sec. 51 and N. 50.

“Express trusts are generally created by an instrument pointing out directly and expressly the property, persons, and the purpose of the trust,
* * *

65 *C. J.* 264, Sec. 46 and N. 84.

“It has been held that no enforceable trust arises from a parol agreement between a trustee and the beneficial owner of land that the trustee shall sell the land, discharge liens, and hold the balance of the proceeds for the benefit of the owner’s children; an agreement that the grantee of land should hold the premises in trust for the benefit of a designated person, to collect the rents, pay the taxes and encumbrances, sell the land, and pay over the difference between the sums received and those paid by the grantee;
* * * an agreement to buy land at execution sale and resell it, and, after deducting purchase price and expenses, pay over the balance to the execution defendant; or an agreement that a grantee of land, under a deed containing no restrictions or erections, shall sell the land after the vendor’s death and divide the proceeds between designated persons. So it has been held that an agreement made at the time of executing a deed, that grantee shall hold the title in trust for the

grantor and, on sale of the land, pay the proceeds to him, is within the statute of frauds forbidding express trusts in land by parol."

65 *C. J.*, 257, Sec. 38 and N. 82-89.

If the legal title of land obtained by reason of a promise to hold it for another, and the latter, confiding in the purchaser, and relying on his promise, is prevented from taking such action in his own behalf as would have secured the benefit of the property to himself, and the promise is made at or before the legal title passes to the nominal purchaser, it would be against equity and good conscience for the latter, under the circumstances, to refuse to perform his solemn agreement. It is accordingly generally held that a trust for the benefit of such other person is charged upon the property, not by reason merely of the oral promise but because of the fact that by means of such promise the purchaser has induced the transfer of the property to himself. The mere non-performance of a beneficial parol agreement is not, however, such fraud or bad faith as will induce a court of equity to compel performance. There must be a salutary and proper limitation to the doctrine of parol trusts and there must be some element of fraud or of bad faith apart from a breach of the agreement itself, which makes it inequitable that the vendee should hold the legal title absolutely or discharged by any trust.

26 *R.C.L.* 1244, Sec. 90 and N. 3, 5.

A parol agreement entered into at the time of executing conveyance of real estate in good faith, that

grantee shall hold the property in trust for the grantor, and, when sold, pay the proceeds to him, is void, as an attempt to create an express trust, by parol, and the land and its proceeds when sold as the property of the grantee. (Syll.)

Marvel v. Marvel (Nebr.), 97 N. W. 640, 113 A.S.R. 792, 793.

“The nature of a trust is to be determined by the instrument evidencing the trust and by that alone.”

65 C. J., 510, Sec. 261 and N. 53.

“It is essential to the validity of a trust whether express or precatory, that the language employed definitely indicates an intention to create a trust, that the subject matter thereof be certain, and that the object of persons intended to have the benefit thereof be certain. The authorities are legion to this effect.”

In Re: Ralston's Estate (Cal.), 37 P. (2d) 76, 77.

So, in the case *infra* it was held to establish a trust (resulting) the evidence must be clear.

Frederick v. Haas, 5 Nev. 389, 394.

In the case *infra* the Court held that parol evidence to defeat a deed and establish a trust, must be clear, and attended with no uncertainty, and even then should be received with great caution.

Dalton v. Dalton, 14 Nev. 419, 427-428.

“Where an express trust is sought to be established by an instrument in writing, the intention

to create the trust must appear upon the face of the instrument''. (Syll.)

Skeen v. Marriott (Utah), 61 P. 296, 300.

The rule adopted and followed by courts of equity requires plaintiff who seeks to establish a trust in real property contrary to the express terms of the deed which vested title in another, to make out his case "clearly and satisfactorily beyond a reasonable doubt" is established law.

Morrow v. Matthew (Ida.), 79 P. 196, 199—
where Court refers to about 100 cases on the point.

"As we understand the statute above quoted, (statute of frauds) it was intended to prevent just such a class of proof and to preclude the possibility of titles becoming subject to the capricious memories of interested witnesses. * * * The statute was enacted to guard against the frailties of human memory and the temptations to litigants and their friendly witnesses to testify to facts and circumstances which never happened. Experience has convinced both juries and law makers that the only safe way to preserve and pass title to real property is by a written conveyance subscribed by the grantor. The beneficial effects of this statute would be destroyed if a grantor could come in years afterwards and submit oral testimony to show that the conveyance was not intended as an absolute grant but was only intended to create a trusteeship in the grantee".

Dunn v. Dunn (Ida.), 83 P. (2d) 471, 475-476.

While in the case *infra* a constructive trust was involved, it is believed the same rule would apply to an express trust where the latter was denied. The Nevada Supreme Court held that a constructive trust cannot be established by a mere preponderance of evidence, but must be established by clear, definite, unequivocal, and satisfactory evidence.

Moore v. DeBernardi, 47 Nev. 46, 220 P. 544, 545.

The rule that plaintiff in certain types of cases must prove his case by more than a mere preponderance, i. e., by evidence that is clear, cogent and convincing, etc., is especially applicable to cases where there has been a long delay, either bringing the case to trial or in commencing it, while witnesses have died and the memories of the living as to important facts have failed.

Kellogg etc. Co. v. Dean El. Co. (D.C. Ohio), 231 F. 194, 195.

In the case *infra* it was contended that a certain writing effected a trust, but the language was not clear. The Court said that while a court of equity may declare and enforce a trust it has no authority to create a trust, or to make a contract for the parties; that vague and indefinite expressions will not be held to create a trust; that proof of intention to establish a trust must be unequivocal; that a voluntary trust cannot be complete unless there is reasonable certainty as to the manner in which the trust fund is to be used or applied and the purposes of the trust must be plainly indicated.

Bliss v. Bliss (Ida.), 119 P. 451, 454.

“Clear and convincing evidence, or something beyond a mere preponderance of the evidence, is usually required in order to establish, by parol or extrinsic evidence, the invalidity of a written instrument, * * * Thus, parol or extrinsic evidence must be clear, positive and convincing in order to contradict or vary * * * the terms of a written contract, or of a deed, * * *”

32 *C.J.S.* 1060, Sec. 1923—citing long list of cases.

THE TRIAL COURT ERRED IN NOT APPLYING THE RULE THAT EVIDENCE TO DEFEAT A DEED AND ESTABLISH A TRUST MUST BE CLEAR, AND ATTENDED WITH NO UNCERTAINTY.

(Point 7, R. p. 108.)

SPECIFICATION OF ERROR NO. VII.

Evidence to defeat a deed and establish a trust must be clear, and attended with no uncertainty, and even then should be received with great caution as to parol evidence.

Dalton v. Dalton, 14 Nev. 419, 427.

See also:

Frederick v. Haas, 5 Nev. 389.

In the case *infra*, the Court held that a person claiming an interest in property, who yet has allowed another to take the title in his own name and to treat it as his own for years, must make out a strong and satisfactory case. Also, that an agreement between two persons by which one, without furnishing any means or doing anything to further the common enterprise, is to share equally in the profits and property

acquired, is without mutuality, founded on no consideration and void.

Mitchell v. O'Neale, 4 Nev. 504, 514.

The rule seems well established in the United States Courts that an extraordinary degree of certainty of proof in cases of a certain trust on the title of real estate is essential to establish the trust.

23 *A.L.R.* 1502—and note citing long list of cases.

THE TRIAL COURT ERRED IN NOT HOLDING THAT THE ALLEGED TRUST, IF ANY (AMENDED COMPLAINT, PAR. 6, R. p. 51), NOT BEING IN WRITING, IS VOID.

(Point 7, R. p. 108.)

SPECIFICATION OF ERROR NO. VIII.

The Nevada statute of frauds reads as follows:

“No estate, or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized in writing.”

N.C.L., Sec. 1527.

In the instant case the complaint shows in effect that the title to the land was taken in the name of Edgar and Alfred Sadler and that they were to raise the necessary \$15,000.00 to pay for the land and the attor-

neys' fees, making a total of \$16,500.00. It is then set up that they were to take the title to this property in trust, etc. The case would seem to be within the rule *infra*, viz.:

“By the great weight of authority, an agreement on the part of one purchasing land with his own money, and taking the conveyance in his own name, to hold it in trust for another person, or to reconvey it to the grantor, is within the statute of frauds. Likewise, if a voluntary grantee in a conveyance orally agreed to hold the land in trust for the grantor or reconvey it upon demand, or to hold in trust for or to convey to a third person, the agreement is generally held to be within the statute of frauds, * * *”

26 *R.C.L.* 1197, Sec. 32, and N. 13, 14.

“Though there are some decisions which apparently hold to the contrary, it is the generally accepted rule that a mere verbal agreement by which one of the parties thereto promises to buy in at a judicial sale lands in which the other has an interest and to hold the same for the latter's benefit, does not, in the absence of other circumstances, create a trust enforceable in equity, even though the agreement is carried out to the extent that the promisor acquires the property at such sale. The agreement is within the statute of frauds.”

26 *R.C.L.* 1244, Sec. 91, and N. 6, 7.

THE TRIAL COURT ERRED IN NOT APPLYING THE RULE THAT WRITING MUST CONTAIN WITHIN ITSELF AND WITHOUT THE AID OF PAROL EVIDENCE, ALL THAT IS NECESSARY TO ENABLE THE COURT TO DECLARE A TRUST.

(Points 1, 2, 3, 6, R. pp. 106-108.)

SPECIFICATION OF ERROR NO. XIII.

“The writing must contain within itself, and without the aid of parol evidence, all that is necessary to enable the court to declare a trust, * * *”

65 *C.J.* 260, Sec. 41, and N. 9.

“There is no sufficient declaration of trust where the memorandum does not purport to create a trust * * * or where it simply relates to the trust property without setting out any trust.”

Humphrey v. Hudnall (Ill.), 84 N.E. 203.

“However, the intention (to create a trust) must be clearly proved; the language used must be such as to disclose with certainty an intention to create a trust. There must be either explicit language in expressing the trust or circumstances which show with reasonable certainty that a trust was intended to be created. The evidence must be clear, explicit, and convincing, not only as to the existence of the trust, but also as to its terms and conditions.”

Allen v. Hendrick (Ore.), 206 P. 733, 741, citing long list of cases.

See also:

65 *C.J.* 266, Sec. 47.

Parol evidence is not admissible for the purpose of showing or creating a trust as this would evade the statute of frauds.

Feeney v. Howard (Cal.), 21 P. 984, 985.

THE TRIAL COURT ERRED IN NOT HOLDING THAT PLAINTIFF'S ALLEGED CAUSE OF ACTION IS BARRED BY HIS LACHES IN DEFERRING SUIT FOR UPWARDS OF 25 YEARS AND UNTIL THE DEATH OF ALFREAD SADLER WHO WOULD OBVIOUSLY HAVE BEEN A MATERIAL WITNESS.

(Points 9, 10, R. pp. 109-110.)

SPECIFICATION OF ERROR NO. IX.

The alleged trust arose, if at all, on March 2, 1918. This action was commenced September 16, 1944,—26 years later. Irrespective of whether we take defendants' testimony for it or we take plaintiff's version, the result is the same. Plaintiff is barred by his own laches. Plaintiff had knowledge through his attorney-in-fact Alfred Sadler of the numerous mortgages, real and chattel, that Edgar Sadler was forced to execute in order to keep the ranch a going concern and avoid foreclosure.

So also, deeds, mortgages and other documents executed by the party claimed to be trustee and put of record are material evidence in an establishment of defense of laches because the beneficiary would be under a duty of examining into matters of a public record where any question as to the acknowledgment of the trust existed. See

William v. Woodruff (Colo.), 85 P. 90, 98.

Public records are constructive notice to plaintiff of their contents, where defendant has not been guilty of any affirmative act of deception to prevent suspicion or inquiry.

30 *C.J.S.* 555, Sec. 128, and N. 91.

While the amended complaint alleges that "since the death of Alfred Sadler on or about March 5, 1944 (Edgar Sadler) has repudiated the trust", this is far short of the requirement when a plaintiff is seeking to excuse a belated discovery and suit. He must aver that he has used due diligence to discover the facts and if he had the means of discovery in his power he will be held to have knowledge.

Fortner v. Cornell (Ida.), 163 P. (2d) 299, 304.

Where action was commenced for an accounting was brought more than 20 years after the right accrued, and the complaint alleged concealment by the defendant of the existence of partnership between him and the deceased, and further alleged that its existence was first discovered after the death of the ancestor, but without alleging the nature of the concealment, what or of whom any inquiries were made, or why they were not made sooner, and would not have been discovered before his death, it was held the petition was subject to a demurrer for laches.

Robertson v. Burrell (Cal.), 42 P. 1086, 1088.

Plaintiff had notice and knowledge of the repudiation of any trust by defendant Edgar Sadler through his agent and attorney-in-fact Alfred R. Sadler. Further, Alfred R. Sadler, one of the alleged beneficiaries

certainly had notice that Edgar A. Sadler disclaimed and denied any trust so far as plaintiff was concerned. Alfred, being one of the beneficiaries and having this notice, and the right of action being joint (and also being plaintiff's attorney-in-fact) knowledge which would bar the action as to one would bar it as to all, either in law or equity.

Robertson v. Burrell (Cal.), 42 P. 1086, 1088.

The case *infra* is identical with the case at bar, except that there the alleged trustee died before claimant filed suit, whereas here, the claimant deferred his suit until after Alfred Sadler, Edgar Sadler's cotenant as to the ranch, died. The case was decided by the Nevada Supreme Court May 5, 1925 and the facts, in substance, were:

One Celeste Pedroli died intestate leaving an estate consisting of horses, cattle, farming equipment and about 400 acres of land together with improvements with water rights appurtenant. He left surviving him a widow Felecitia and three children, Charles Pedroli then 29 years of age and now deceased, Julius Pedroli, a son then aged 24 years of age, and Mary E. Pedroli, a daughter aged 20 years. Felecitia Pedroli was appointed and qualified as administratrix of the estate of Celeste Pedroli and the estate of the latter was distributed one-half to the surviving widow and one-sixth to each of the three surviving children. Upon the death of the father, Charles Pedroli without objections on the part of his brother and sister assumed and entered into the exclusive management and control of the property. It was alleged that the property

was by the said brother and sister left in the care, custody and control of Chaarles. Continuously thereafter and until the time of the death of Charles he managed and controlled the property and exercised dominion over it and handled, traded, sold and otherwise disposed of the same and the rents, issues and profits and increase thereof, in his own name and in like manner as though he were the sole owner thereof, but always, it was alleged, subject to the rights of his brother and sister and as their agent and trustee insofar as their rights and interests were affected thereby, and for their use and benefit.

Felecitia Pedroli died intestate September 6, 1911, leaving an estate consisting of her undivided one-half interest and in the increase to the personal property and additions to the real estate. Her surviving heirs were the said children. Charles Pedroli was appointed and qualified as administrator of her estate on February 19, 1912 and entered upon the duties of his trust and took possession of all of the real and personal property and continued so until January 12, 1919.

On July 9, 1912 at the motion of Charles Pedroli as administrator, the estate of Felecitia was by decree of Court distributed as follows: an undivided one-third thereof to each of said children, which decree provided in part that upon the production of satisfactory vouchers by the administrator that he had paid all the sums of money due from him and deliver all the property of the estate to the parties entitled he be discharged from the said trust and that he and his sureties be released from all liability therefrom

thereafter to be incurred on account of the administration of this estate. Charles Pedroli never paid or delivered the property described in the decree to his brother and sister and was never discharged from his trust, and without objection on their part retained possession and control of all thereof, together with the rents, issues and profits thereof from the time of his appointment to the time of his death.

It was further alleged that during the time from the date of the death of the father to the date of the death of Charles Pedroli in January, 1919, the latter received and had said property in his possession and under his control and management, together with the rents, issues and profits, and increase thereof, and possessed, controlled, sold, disposed of the same without objection on the part of his brother and sister, as their agent and trustee, as though the same were his sole and separate property, but not adversely to their interest therein or in derogation of their rights thereto, but that at all times he admitted and recognized their rights as the owners of an undivided two-thirds interest in the property and the rents, issues, profits, and increase thereof, and that all of the property was either the original property belonging to the estate of Celeste Pedroli and the estate of Felecitia Pedroli, or was acquired by Charles Pedroli out of the rents, issues, profits and increase of the property of those estates while he was acting as the agent and trustee of his brother and sister; that an undivided two-thirds interest of the same is the property of the brother and sister.

It was further alleged that Charles Pedroli never at any time accounted to the brother and sister concerning his management, control and disposition of their interest in the property; that they permitted him to act as their agent and trustee with the full faith and confidence in his business management and integrity in the bona fide belief that he was more competent in that respect than either of them to manage the same to the best advantage and greatest profit to himself and them; that they believed that he would account fully and honestly to them at any time they or either of them made upon him a demand therefor; that for these reasons they never made a demand on him for an accounting and were always willing to leave the control, management, and disposition of the property in his hands with full faith and confidence in his judgment and integrity.

Demurrer was interposed on the ground of insufficiency of facts and that it appeared upon the face of the amended complaint that the cause of action therein set forth if any ever existed was barred at the time of the commencement of the action by the laches of the plaintiffs, and under the doctrine of equitable estoppel. The Court entered into an exhaustive consideration of the doctrine of estoppel, its application, etc. and then referred to the fact that the complaint showed that a great lapse of time, 22 years from the creation of the alleged trust, showed a lack of equity. That during all of this time Charles Pedroli was in possession of the property openly and notoriously exercising dominion over it as though it were his sole and separate property. He managed, controlled, and disposed of it,

and acquired and invested the profits from it in his own name. From the profits he acquired other property to the extent that at the time of his death the original property belonging to the estate of his father had been increased in amount from 400 acres of land and 100 head of stock cattle, and 20 tons of hay, to 880 acres; 300 head of cattle, 75 head of calves and 200 tons of hay. In addition he had acquired 15 bonds of the Lovelock Drainage District; 12 shares of stock of the Bank of Italy, Liberty Bonds of the par value of \$3600.00, a promissory note with accrued interest, a life insurance policy on the life of the deceased for the sum of \$5000.00 payable to his estate as the beneficiary and cash in the amount of \$12,000.00.

The Court stressed the fact that during the entire period of 22 years Charles Pedroli paid nothing to the brother and sister plaintiffs; he rendered no account of his management of the property to them nor was any accounting demanded of him by either of them. No reasons were alleged for their long delay in making claim except that Charles was more competent to manage the property for the best interests of himself and them and that he was honest and upright in all his business affairs and that they believed he would fully account at any time they made a demand on him.

The Court also especially mentioned and stressed the fact that it was incredible that in all of the years when the property was being managed profitably by Charles Pedroli that the brother and sister plaintiffs should have no desire to share in any portion of the profits. The Court also mentioned that all of the acts

of Charles were open and notorious and consistent with the absolute ownership, and then said that these facts, together with the prolonged absence and silence of the respondents during the lifetime of Charles concerning their alleged interest in the property present a case of grave doubt as to the existence of the trust claimed. The Court further stated that

“even if the trust relation were admitted the futility of entering on an investigation after such a lapse of time when the trustee is dead, to determine equitably what portion belonged to his estate and what portion belonged to respondents, is apparent. A court of equity would be unable, under the circumstances, to do justice to the parties. The injustice, if any, must fall upon the negligent.”

The Court then cited the case of *Kleinclaus v. Dutard* (Cal.), 81 P. 516, as being on the facts strikingly parallel to the case then before it and approved of the principles laid down by the California Court in the *Dutard* case.

Cooney v. Pedroli, 49 Nev. 55, 235 P. 637.

See also:

Freeman v. Hopkins (C.C.A. Cal.), 32 F. (2d) 756, 759.

“If it appears that an adverse party has lost any advantage which he might have retained if plaintiff’s claim had been asserted with reasonable promptness, or is exposed to any injury through inexcusable delay, a court of equity will not interfere to grant relief to the dilatory claimant.”

Miller v. Walser, 42 Nev. 499, 181 P. 437.

“Beneficiary has no right to relief against trustee, where, without adequate excuse, he delays asserting his rights until the proofs respecting the transaction out of which he claims his rights arose are so uncertain and obscure that it is difficult for the court to determine the matter.” (syll.)

Norfleet v. Hampson (Ark.), 209 S.W. 651.

“Any circumstances tending to obscure the truth of the matter, as the loss of witnesses through the efflux of time, may prompt a court of equity to apply the doctrine of laches.”

Miller v. Walser, 42 Nev. 499, 181 P. 437.

See also:

Noble Gold M. Co. v. Olsen, 47 Nev. 448, 66 P. (2d) 1005.

In the case *infra* the alleged trustee had received rentals from certain property which it was claimed by the plaintiff it was his duty to account for and that the lease on the property so required. The lease ended April, 1886, and the trustee lived for nearly 8 years thereafter, having died on February 20, 1894, and the action was not commenced until June 25, 1895, more than 9 years after the expiration of the lease. The trial Court found that the action was barred by laches and on appeal, the Supreme Court said that under the circumstances stated there was no warrant for disturbing the finding of the subject of laches and the order appealed from was affirmed.

Coyle v. Lamb (Cal.), 55 P. 901, 902.

“If, during the long delay, important testimony has been lost or destroyed, and the memory of the original transaction become hazy and indistinct, a court of equity may refuse to grant relief because of its inability to do certain and complete justice.”

Brissell v. Knapp (C.C.A. Nev.), 155 F. 809, 811—per Farrington, Judge.

“Some of the circumstances, in addition to the lapse of time, which will in equity constitute laches, are destruction of the muniments of title, the death or removal of the parties, the number of innocent purchasers who may be affected, radical changes in the condition or value of the property, and its speculative character.”

Miller v. Walser, 42 Nev. 499, 181 P. 437.

The mere assertion of a right or even a mere institution of the suit, does not relieve a person from the operation of the rule of laches; if he fails to prosecute his suit diligently, or if he fails to accompany his assertion of a right by the institution of a suit within reasonable time, the consequences are the same as though no suit had been begun.

21 *C.J.* 215;

Gill v. Colton (C.C.A. 4th), 12 F. (2d) 531, 535—citing a number of cases.

“Independently, however, of the statute of limitations, an accounting may be refused where the party seeking it has been guilty of laches or has allowed his claim to become stale.”

65 *C.J.* 896, Sec. 791, and N. 48—citing long list of cases.

To the effect that the general rule is that if the plaintiff has notice either actual or constructive of an alleged fraud or other transactions constituting breach, etc., though he has notice of only a part or his knowledge is incomplete, is still under the duty of making inquiry and it will be considered that he had good notice of all matters to which an inquiry diligently prosecuted would have led, see:

Davis v. Heynes (Kans.), 181 P. 566, 567.

TRIAL COURT ERRED IN FINDING REINHOLD SADLER WAS THE OWNER OF ANY INTEREST IN SAID RANCH BECAUSE THE ONLY CLAIM OF EVIDENCE THAT REINHOLD SADLER OWNED ANY INTEREST IN DIAMOND VALLEY RANCH WHEN HE DIED IS THAT HE OWNED 4000 SHARES OF STOCK OF HUNTINGTON AND DIAMOND VALLEY LIVESTOCK AND LAND COMPANY, AND THE ONLY EVIDENCE OF OWNERSHIP OF SAID SHARES BEING EXHIBIT 17, THE ALLEGED INVENTORY, WHICH IS NOT VERIFIED BY THE ADMINISTRATRIX, LOUISA SADLER.

(Point 4, R. p. 107.)

SPECIFICATION OF ERROR NO. X.

There is no evidence that the said Huntington etc. Co. owned the Diamond Valley Ranch on January 29, 1906 when Reinhold Sadler died. Per contra, Exhibit F shows that prior to 1906 Reinhold Sadler et ux., for a consideration of \$15,000.00 by a grant, bargain and sale deed conveyed the Diamond Valley Ranch to *Diamond Valley Livestock and Land Company*, a distinct corporation, and there is no evidence we know of showing that prior to January 29, 1906 the said Diamond etc. Co. title passed to said Huntington etc.

Co. The "Huntington Valley Stock and Land Company", a corporation, is alleged in the amended complaint to be the company in which Reinhold Sadler owned shares, whereas the 4000 shares set up in the alleged inventory are those of the "Huntington & Diamond Valley Live Stock and Land Co."

In view of the foregoing and it not being *idem sonans* that there was a corporation named "The Huntington Valley Stock and Land Company" is shown by fact it was named as a defendant in the quiet title suit No. 2380, the shares mentioned in the "Inventory" may as well have been in that corporation as in the one claimed by plaintiff, we say there is a fatal variance between the allegation and the proof, even conceding the so-called inventory constituted proof.

If further evidence were necessary, it is supplied by the amended complaint paragraph 2 where it is alleged:

"Reinhold Sadler, at the time of his death on January 29, 1906 was the owner * * * of and in the possession of certain real and personal property in the State of Nevada, among which were what is known as the Diamond Valley Ranch in Eureka County, Nevada, and the appurtenances, also live stock, ranch equipment and other personal property upon said ranch."

If, as alleged per supra, Reinhold Sadler was on January 29, 1906 the "owner" of the Diamond Valley Ranch, how could the Huntington etc. Co., in which

the 4000 shares were allegedly held, be also the "owner" of the same property and at the same time?

But further, and passing other objections, we say Exhibit 17 cannot constitute any legal evidence of ownership of said shares by mere fact of same being included in the inventory, because said inventory is not verified by Louisa Sadler as required by law. Nevada Compiled Laws, 1900, Sec. 2876, in force at the time, provides that the administrator or executor "shall take and subscribe an oath before any officer authorized to administer oaths, that the inventory contains a true statement of all the estate of the deceased which has come to his possession or of which he has knowledge * * * The oath shall be endorsed upon or annexed to the inventory."

When signing of jurat by officer is omitted, this constitutes a fatal defect.

Lutz v. Kenney, 23 Nev. 279, 46 P. 257, 258—

"Jurat is essential";

State v. Board, 5 Nev. 317, 320;

2 *C.J.* 363, Sec. 109, and N. 91, citing cases;

2 *C.J.S.* 961, Sec. 21.

"An affidavit is not proved to have been made unless the jurat is authenticated by both such seal and signature."

Tunis v. Withrow (Ia.), 77 A.D. 117, 118.

Nor can the so-called "ancient document" rule apply. That rule

"* * * embraces no instrument which is not valid on its face and which does not contain every essen-

tial requirement of the law under which it was made. * * *”

22 *C. J.* 957, Sec. 1183, and N. 16;

Meegan v. Boyle, 19 How. 130, 15 L. ed. 577.

The ancient document rule merely creates a presumption that the document is genuine, and does not import verity to any of its recitals.

Gevin v. Calegaris (Cal.), 73 P. 851, 853;

Meegan v. Boyle, 19 How. 130, 15 L. ed. 577.

The heirs (according to plaintiff's case) have not treated the alleged inventory as valid. Per contra, *vide* Exhibit 8 diverting property from insolvent estate because it would be “disastrous” to run said property through the estate they “have acted in regard to their father's estate as if” no administration were attempted.

Meegan v. Boyle, 19 How. 130, 15 L. ed. 577.

TRIAL COURT ERRED IN GIVING EFFECT TO EXHIBIT 8 BECAUSE SAID EXHIBIT 8 PURPORTS UPON ITS FACE TO BE A MEMORANDUM OF AGREEMENT TO BE SIGNED BY EDGAR, ALFRED, BERTHA, LOUISA AND CLARENCE SADLER, AND BEING AT MOST, SIGNED BY ONLY TWO OF THEM, THE INSTRUMENT IS INCOMPLETE AND INVALID FOR ANY PURPOSE.

(Points 3, 6, R. pp. 107-108.)

SPECIFICATION OF ERROR NO. XI.

Exhibit 8 (R. p. 41), by its recitals upon its face, shows that it was intended to be signed by all of the

parties thereto,—five in number. But in fact was only signed by two, conceding that Edgar actually did sign the document. According to plaintiff's theory, each of the five owned undivided interests in the real and personal property and obviously could not be held to an agreement that the property be held for an indefinite period for an advantageous sale, etc., without their consent. The case is squarely within the rule of the case *infra*, where the Court held that it appearing the understanding between the parties being the agreement was to be reduced to writing and signed by the parties thereto, it had no binding effect.

Morrill v. Tehama M & M Co., 10 Nev. 125, 133-134.

“Plaintiffs entered upon land under an order agreement with defendant for a lease. The proposed lease was reduced to writing, while plaintiffs were in possession, signed by defendant and one of plaintiffs, and then left with defendant for the other plaintiff to sign, but he never did so, and there was no evidence that he ever accepted the lease, or knew of its existence. Plaintiffs afterwards, having left the premises at the command of defendant, brought an action on the lease. Held that the action could not be maintained by the plaintiff who had not signed or accepted the lease, and therefore a nonsuit was properly granted.” (syll.)

Castro v. Gaffey (Cal.), 31 P. 363.

Exhibit 8 conclusively showing on its face it was intended to be signed by the five parties therein

named (conceding that Edgar Sadler actually signed it), in fact is signed by only two, there is nothing to show that the unsigned parties had any knowledge that the paper was ever executed and certainly no evidence that they acquiesced or consented thereto. The case *infra* involved a somewhat similar situation involving a contract to which there were five parties, but only three signed, and in affirming judgment that the document never reached the state of being a contract, the California Supreme Court said:

“The instrument of September 2, 1872 was never completely executed. It is evident that upon an inspection of the writing itself that it was intended to be signed by all the parties to the contract upon which it was endorsed. These parties were the two principals in the contract and the two sureties upon the bond attached to and forming a part of the contract. It was signed by but three of these persons.”

Barber v. Burrows, 61 Cal. 404, 406.

The case *supra*, on the principle stated, was affirmed by the California Supreme Court in the case *infra*.

Jackson v. Torrence (Cal.), 23 P. 695, 700.

Obviously in the instant case, there being no signature of Clarence, Bertha or Louisa Sadler to Exhibit 8, and no allegation or showing that they ever accepted same in any of the legal methods constituting acceptance, if an action were brought against them or any of them by Alfred or Edgar to compel them to specifically perform by deeding their equity when a good price was obtained for the ranch, etc., they undoubt-

edly could successfully defend by showing that they had never signed the agreement.

Houser v. Hobart (Ida.), 127 P. 997, 1000. (The Idaho Statute of Frauds is practically identical with that of Nevada.)

THE TRIAL COURT ERRED IN NOT APPLYING THE RULE THAT PLAINTIFF CANNOT PREVAIL EXCEPT UPON THEORY THAT AS HEIR OF REINHOLD SADLER, HE (AS WELL AS THE OTHER FIVE) HAD AN EQUITABLE INTEREST OR ESTATE IN THE DIAMOND VALLEY RANCH. THE STATUTE N.C.L., SEC. 1527, INCLUDES EQUITABLE ESTATES AND HENCE SAID EXHIBIT 8 IS VOID UNDER SAID STATUTE BECAUSE NOT SIGNED BY ALL HOLDERS OF BENEFICIAL INTEREST.

(Points 1, 2, 3, 6, R. pp. 106-108.)

SPECIFICATION OF ERROR NO. XII.

“It is well settled that the Statute of Frauds embraces equitable estates in land. They are, even more than legal estates, exposed to the mischief which that statute was designed to remedy * * * But under the statute of frauds, an equitable interest in or title to land cannot be created, transferred, conveyed, or assigned by parol. The statute applies as much to the purchase of an equitable use in land as it does to a transfer of the legal title * * * Contracts for the sale of equitable interest in land are as much within the statute of frauds as contracts to convey the legal title.”

27 *C.J.* 202, Sec. 151, and note citing cases.

In the case *infra* the appellants claimed under an equitable assignment and the defense was that the

assignment not being in writing was void under the statute, citing *Miller v. Hathaway*, 27 Cal. 144. The Court held that while parol evidence was admissible to establish such a trust, it was also well settled that the interest of the *cestui que trust* could not be conveyed by parol (citing *Perry on Trusts*, Sec. 79) and continued:

“The interest of the *cestui que trust* is an equitable interest in land, and a sale or release of the same can only be proved by a conveyance, or other instrument in writing, subscribed by the party granting or releasing the same, or by his lawful agent under written authority, and executed with such formalities as are required by law. Nor is any contract or agreement by the *cestui que trust*, for the sale of such equitable estate or interest in land, valid, or admissible as evidence, unless said note or memorandum thereof, expressing a consideration, be in writing, and subscribed by the parties to be charged, or by his lawfully authorized agent. (Citing the Oregon Code.)”

And the Court continued, saying:

“The equitable estate of Mrs. Wagner is admitted, and existed at the time the verbal agreement was made with the appellants, unless she previously released the same by proper instrument in writing, to the respondent Jessie B. Lewis, in consideration of the real and personal property conveyed to her as alleged. It is unnecessary, however, to consider that question. The agreement was for the sale of an equitable estate or interest in land, which under the provi-

sions of our statute, above cited, is required to be in writing." (Citing cases.)

Chenoweth v. Lewis (Ore.), 39 Pac. St. Reports 150, 151, 9 Ore. 152.

The so-called trust agreement, Exhibit 8, on its face in no way indicates that the title should go or had gone to Alfred and Edgar Sadler, or either of them. For aught that appears from said Exhibit 8, the legal title may have gone to Clarence Sadler, or to any of the other three or four or five beneficiaries, in which case, of course, the person sought to be held as trustee could not be so held except by his signing the document claimed to be the declaration of trust. The foregoing is especially important in view of the fact that the deeds from Hermann J. Sadler, and it being alleged (paragraph 7, Amended Complaint) that on or about March 12, 1918 the Huntington and Diamond Valley Stock and Land Company duly transferred and conveyed said real property and appurtenances to defendant Edgar Sadler and to Alfred R. Sadler, and the president of said company also conveyed the same to Edgar A. and Alfred R. Sadler by deed recorded in the office of the county recorder of Eureka County, Nevada, on March 23, 1918. Copy of said deed is annexed to the original complaint as Exhibit I.

"A beneficial interest or estate in real property cannot be conveyed by parol."

27 *C.J.* 202, N. 37.

“Contracts for the sale of equitable interests in land are as much within the statute of frauds as contracts to convey the legal title.”

27 *C.J.* 202, Sec. 151, and N. 42.

The statute of frauds is applicable to all interests in land, whether corporeal or incorporeal, except where so provided, leases do not exceed a prescribed period.

37 *C.J.S.* 577, Sec. 69, and N. 18.

According to the allegations of the amended complaint and the whole theory of plaintiff's case, each of the parties (5 of them) were owners of beneficial title of the alleged trust property. Conceding for the argument, that Edgar Sadler signed, still Bertha Sadler and Mrs. Louisa Sadler did not sign, nor, apparently, did Clarence Sadler sign, because the document does not purport to be executed by Alfred R. Sadler as attorney-in-fact for Clarence. Inasmuch as Exhibit 8 does not segregate Edgar Sadler and Alfred Sadler as being in any way different towards the subject matter than the other heirs, the question necessarily arises as to whether Exhibit 8, not being signed by Clarence, Bertha or Louisa Sadler, the same is valid or of any legal effect whatsoever, under the statute of frauds. See:

N.C.L., Sec. 1527.

“It is well settled that the statute of frauds embraces equitable estates in land, inasmuch as they are, even more than legal estates, exposed to

the mischief which our statute was designed to remedy.”

37 *C.J.S.* 587, Sec. 81, and N. 47 citing cases.

“Equitable estates in realty, as well as legal estates, are within this clause of the statute (statute of frauds) if it is sought to create an equitable estate by an oral contract alone, or to enter into an oral contract for transferring such estate.”

2 *Page on Contracts* 2191, Sec. 1256, and N. 1.

Clarence, Bertha and Louisa Sadler, each having an equitable estate or interest in the land, the same was within the statute providing that any release thereof must be in writing, subscribed by the party granting the same.

Miller v. Hathaway, 27 Cal. 119, 144.

In the case *infra* the grantee in a conveyance undertook to defend by showing there was a parol agreement to surrender, rescind or abandon the trust which the grantor had created by the conveyance. The Court cited the Arizona statute of frauds (which is substantially the same as the Nevada statute) and ruled that a writing signed by the party to be charged was required to establish the surrender, rescission or abandonment of the trust as to the real property or the equitable interest affected.

Coleman v. Coleman (Ariz.), 61 P. (2d) 441, 443-444.

In the instant case the plaintiff Clarence Sadler appears to be in precisely the same position as one of the lessees in the case *infra* who was disabled from

maintaining the suit because he had not signed the document.

Castro v. Gaffey (Cal.), 31 P. 363.

To the effect a contract, if executory on both sides, is not valid unless it is enforceable against either party, in equity at least, unless the contract or the note or memorandum thereof is signed by each party, the reason being that in order to have specific performance there must be a mutuality of remedy as well as mutuality of obligations, see

2 Page on Contracts 2293, Sec. 1327.

See also:

Houser v. Hobart (Ida.), 43 L.R.A. (N.S.) 410, 127 P. 997.

In the instant case, according to plaintiff, because (as plaintiff claims) Reinhold Sadler owned 4000 shares of stock in a corporation claimed by plaintiff to have been the owner of the Diamond Valley Ranch, the plaintiff therefor had an equitable or beneficial interest in the Diamond Valley Ranch and hence necessity for consideration for alleged trust was dispensed with. But if so, then it necessarily follows that plaintiff's signature to the alleged trust was essential, in support of which we cite:

“The party whose signature is essential is the party who by law is enabled to declare the trust; and it has been decided that, whether the property is real or personal, the party enabled to declare the trust is the owner of the beneficial interest, who has therefore the absolute control over

the property, the holder of the legal estate being a mere conduit pipe.”

(The above is taken from Plaintiff's Op. Br. quoting: *Perry on Trust and Trustees*, 7th ed., pp. 90-92.)

For the reasons above presented to this Honorable Court appellant respectfully asks that the judgment and decree of the trial Court be reversed.

Dated, Reno, Nevada,
November 28, 1947.

Respectfully submitted,

H. R. COOKE,

JOHN D. FURRH, JR.,

Attorneys for Appellant.